NO. 89-814

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In the Supreme Court of the United States

OCTOBER TERM, 1989

CENTRAL GULF LINES, INC.
Petitioner

VERSUS

WILBERT WILLIAMS, Personal Representative of the Estate of BALLARD WILLIAMS, Deceased
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner submits that its application for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit presents the folowing questions for review:

1. Survivor of a seaman who contracts AIDS while aboard a Navy chartered U.S. flag vessel has an exclusive remedy against the United States pursuant to the Suits in Admiralty Act.

The Fifth Circuit majority decision below erred in interpreting the terms "agents or employee" of the U.S. and also erred when it refused to follow the generally accepted law on the subject.

2. The decision below is contrary to the established law of this Court and the circuits which recognize that an operator of a vessel time chartered to the Navy is an agent of the United States and not suable for purposes of §745 of the Suits in Admiralty Act for crewman's death claim. *Calmar S.S. Corp. v. United States,* 73 S.Ct. 733 (1953); *Smith v. United States,* 346 F.2d 449 (4th Cir. 1965); *Doyle v. Bethlehem Steel Corp.,* 504 F.2d 911 (5th Cir. 1974). The Fifth Circuit erred in reversing the district court by ignoring the 1950 Amendment to 46 U.S.C. §741 which clarified that the United States assumed sole responsibility for the wrongful acts of its maritime agents under the Suits in Admiralty Act, 46 U.S.C. §741, *et seq.*

3. A writ must be granted to review vital questions pending in at least seven states concerning the construction and operation of the Suits in Admiralty Act. The Fifth Circuit has erred in their fundamental assumptions regarding the Act and the application of the decision below could be disastrous to the Government in critical times, such as during a war.

4. The Suits in Admiralty Act was enacted and amended by Congress to relieve the United States from obstruction of its commercial traffic by the seizure of military cargoes or merchant vessels operated by it, operated for it or owned by it.

5. Whether the term "public vessel" includes privately owned vessels exclusively transporting Navy munitions and supplies, 46 U.S.C. §781, *et seq.*

CERTIFICATE

The interested parties are Wilbert Williams (hereinafter referred to as "Williams"), individually and as representative of the Estate of Ballard Williams, who died of Acquired Immune Deficiency Syndrome, and Central Gulf Lines, Inc. (hereinafter referred to as "CGL"), the owner and operator of the S.S. BAY for the United States of America. A parallel suit has been stayed in the United States District Court for the Eastern District of Louisiana entitled, "Williams v. United States of America," Civil Action No. 88-2464. The Petition for Writ involves the question of whether a seaman on a Government-chartered vessel has an exclusive remedy against the United States of America under the Suits in Admiralty Act, 46 U.S.C. §741, *et. seq.*, or Public Vessels Act, 46 U.S.C. §782, which will affect the following pending state and federal lawsuits:

NAME OF CLAIMANT	LOCATION OF SUIT	C/V NO.	COURT
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Ira Ross v. CGL	New York, N.Y.	27147/86	State
James Carraher v. CGL	San Francisco,CA	90-0821	State
Patricia Walker v. CGL	Galvestson, TX	H-89-0529	Federal
Dennis Wilson v. CGL	New Orleans,LA	88-16181	State/Federal
Robert Vasko v. CGL	Portland, OR	88-0865FR	Federal
Noble Turner v. CGL	New Orleans, LA	84-6854	State
James Hayward v. CGL	San Francisco, CA	86-6829	State
Claude Harris v. CGL	Norfolk, VA	87-1722	State
James Brown v. CGL	New Orleans, LA	88-5107	Federal
Willimon Thurmon v. CGL	San Francisco, CA	90-2466	State
Herman Lamm v. CGL	New Orleans, LA	89-4122	State
		89-2412	Federal

NAME OF CLAIMANT	LOCATION OF SUIT	C/V NO.	COURT
John Gener v. Waterman	Philadelphia, PA	88-5332	Federal
Robert Sutton v. U.S. & Vessel Charters, Inc.	San Francisco, CA	88-1704	Federal
William Rose v. VCI	California	88-2274	Federal
Buters v. VCI	California	88-4881	Federal
Jackson v. VCI	California	89-2675	Federal
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

CENTRAL GULF LINES, INC.

Petitioner

v.

WILBERT WILLIAMS, Personal Representative of the Estate of BALLARD WILLIAMS, Deceased

Respondents

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

1. CGL filed a Motion for Summary Judgment asserting that Williams' exclusive remedy was against the United States of America under the Suits in Admiralty Act or Public Vessel Act. On April 13, 1988, summary judgment was granted by the United States District Court for the Eastern District of Louisiana.

2. On June 9, 1988, a parallel suit was filed in the United States District Court for the Eastern District of Louisiana entitled "Williams v. United States of America," Civil Action No. 88-2464.

3. On June 12, 1989, the United States Court of Appeals, Fifth Circuit, vacated and remanded the case in a 2-1 decision with Judge Gee concurring in part and dissenting. *Williams v. Central Gulf Lines, Inc.*, 874 F.2d 1058 (5th Cir. 1989).

4. CGL's request for Rehearing, En Banc, was denied by the Court of Appeals for the Fifth Circuit on August 22, 1989.

JURISDICTION

Jurisdiction of the district court was predicated upon the Jones Act, 46 U.S.C. §688 and the General Maritime Law. CGL argued that jurisdiction was either pursuant to the Suits in Admiralty Act, 46 U.S.C. §741, *et seq,* or the Public Vessels Act, 46 U.S.C. §782. This Court has jurisdiction pursuant to 28 U.S.C. §1254 and is requested to review the decisions of the Fifth Circuit Court of Appeals in vacating, remanding and denying rehearing of the district court's entry of a summary judgment.

STATUTES INVOLVED

CGL's Petition raises serious issues concerning the interpretation and application of the Suits in Admiralty Act and Public Vessels Act.

> 46 U.S.C. §741. **Exemption of United States vessels and cargoes from arrest or seizure**
>
> "*No vessel* owned by the United States . . . . or *operated by or for the United States* . . ., and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein *made for a libel in personam, be subject to arrest or seizure by judicial process* in the United States or its possessions. . . ."
>
> 46 U.S.C. §742. **Libel in personam**
>
> "In cases where *if such vessel were privately owned or if such cargo were privately owned or possessed, or if a private person or property were*

involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in Section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . . In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party."

46 U.S.C. §745. **Causes of action for which suits may be brought; limitations; exceptions; actions which may not be revived; interest on claims**

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: Provided, That *where a remedy is provided by this chapter it shall hereafter be exclusive* of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim.

STATEMENT OF THE CASE

The S/S BAY was a CGL-owned vessel chartered and operated for the Military Sealift Command, Department of the Navy, (hereinafter MSC). In March 1984, a crew member, Ballard Williams, fell ill in the Philippines and was treated by the U. S. Navy at Subic Bay and later at

Clark Air Force Base Hospital.

The S/S BAY, throughout the time of the charter, *only* transported Government-owned cargoes and did not engage in any commercial activity outside its contract. It was in all respects a ship placed in the exclusive service of the sovereign and, as such, operated as a United States Government vessel.

Ballard Williams was a single, 58-year old male, employed as a steward on the S/S BAY. He had sailed worldwide, including West Africa. The S/S BAY was on a voyage in the Pacific on March 27, 1984, when Ballard Williams became ill with flu-like symptoms. On March 28, 1984, Mr. Williams was transferred to the nearest medical facility at Subic Bay. On April 4, 1984, Mr. Williams was transferred to the Clark Air Force Base Hospital and was under the care of U. S. Board Certified physicians there until his death. Because of the strange and unrelated symptoms manifested by Mr. Williams, a diagnosis was difficult despite a battery of diagnostic tests. Attempts were made by CGL to repatriate Mr. Williams but his Government-treating physicians advised against it. The care and treatment of Ballard Williams was monitored by CGL in telephone conversations and telexes until the time of his death.

The initial autopsy report issued by the Clark Air Force Base Hospital showed the presence of multiple glioblastomatic brain tumors, a terminal condition. A blood sample was maintained by the U. S. Air Force and an amended Autopsy Report dated January 16, 1987, combined with a seriological study and consultation report dated July 16, 1985, confirmed that Mr. Williams' cause of death probably was Acquired Immune Deficiency Syndrome (AIDS).(Lodging 1)

During all relevant times MSC retained ultimate operational control of the S/S BAY while delegating only her physical conduct to CGL. This is evidenced by the MSC Charter Party (Lodging 2) and the undisputed Affidavit of CGL (Appendix A). Reference to the pertinent sections reveal:

Article 22: *The Master, Officers and Crew* - . . . recognizes that the S/S BAY was under the direction of MSC but that CGL retained physical control of the vessel's navigation . . . the Master was deemed the agent of the MSC during loading, stowing and discharging of cargo.

MSC provided all requisite instructions and sailing directions. . .

. . .MSC retains the right to make personnel changes.

Articles 7 and 8: *Cargo Loading and Discharging* - MSC designated the cargo to be loaded and the ports of call.

Article 14: *Charter Hire* - MSC is responsible for all crew additional wages, including munitions pay. . .

MSC paid the cost of crew repatriation. . . and over-time expenses.

Article 11: *Alterations* - MSC had authority to install armaments and equipment on the vessel. . .

Article 13: MSC prepared the vessel's manifest and tallied and checked all cargo.

Article 16: *Port Charges and Expenses* - MSC paid all port charges, taxes, related expenses, and agents fees.

Article 18: *Fuel* - MSC paid fuel costs.

Artile 21: *Owner's Obligations* - CGL acted as MSC's *agent*. CGL maintained written logs. MSC could assign its own passengers and officers to the crew.

Article 33: *Inspection* - The United States had the right to inspect the S/S BAY before and during the charter period.

The S/S BAY was operated exclusively for MSC and transported U. S. designated military supplies including munitions. Although its owner, CGL, provided the crew, the ultimate control of the S/S BAY resided with MSC. The Master, officers and crew were controlled by the MSC in every respect regarding decisions involving navigation, care, custody and sailing routes. There is no factual dispute that the S/S BAY was "operated for" MSC by CGL, its agent.

CGL is seeking writs for this Court to review the application of the Suits in Admiralty Act to vessels "operated for" the United States. These vessels are an integral part of the United States' merchant fleet. The paramount question is should the Government's affairs be interrupted by seizure of its vessels or cargoes? Congress answered "no" to this question and it assumed responsibility for the wrongful acts of its maritime agents pursuant to the provisions of the Suits in Admiralty Act which precludes *in rem* proceeding against such vessels. CGL strongly feels that it is imperative to reinstate the district court's judgment in accord with *Calmar S.S. Corp. v. United States*, 73 S.Ct. 733 (1953); *Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir. 1982), and the simple application of 46 U.S.C. §741, 742, 745. Alternatively, CGL shows that the S/S BAY was a public vessel under 46 U.S.C. §782, and thus not subject to seizure.

ARGUMENT

A VESSEL "OPERATED FOR" THE UNITED STATES IS NOT SUBJECT TO *IN REM* SEIZURE SINCE TO PERMIT SEIZURE WOULD INTERUPT GOVERNMENT OPERATIONS

The Suits in Admiralty Act was enacted to prevent the United States from interruption of its commercial activity through seizure of merchant vessels which are owned by it *or* under its control. *Kunglig Jarnvagsstyrelsen v. United States,* 19 F.2d 761 (2nd Cir. 1927); 46 U.S.C. §741.

It is axiomatic that a munitions ship like the S.S. BAY was no less a vessel of the U. S. than a naval submarine and no valid distinction can be drawn between the inconvenience arising from seizure of a munitions ship and the seizure of a submarine.

The Fifth Circuit's decision in effect opens a Pandora's box in that vessels "operated for" the United States will now for the first time be subject to seizure with attendant interruptions. The issues before this Court are serious and affect pending litigation in no less than seven states.

By not recognizing that the Suits in Admiralty Act applies to vessels "operated for" the United States, the Fifth Circuit has in effect "judicially repealed" the 1950 Amendments to the Suits in Admiralty Act, 46 U.S.C. §741, *et seq,* and crossed the bounds of the Constitution's separation of powers. The Suits in Admiralty Act was amended by the legislative branch to halt judicially created "legal confusion" and to "provide an exclusivity of remedy," bringing an end to uncertainty in the choice of defendants. S. Rep. No. 1782, 81st Cong., 2d Sess. 1950, U.S. Code Cong. Serv. 4210.

The United States statutorily assumed responsibility for the wrongful acts of its "maritime agents," thus providing a "jurisdictional hook" and remedy against the United States. CGL, as operator of a vessel time chartered to the United States, was a maritime agent of the United States for purposes of the Suits in Admiralty Act. *Smith v. United States*, 346 F.2d 449 (4th Cir. 1965); *Doyle v. Bethlehem Steel Corp.*, 504 F.2d 911 (5th Cir. 1974). The Fifth Circuit majority erred in refusing to read §741, 742 and 745, *in pari materia*, and applying the Suits in Admiralty Act as intended by Congress to time-chartered vessels operated for the United States. *See, Calmar S.S. Corp. v. United States, supra; Trautman v. Buck Steber, Inc., supra.*

Congress, which created the Jones Act, unquestionably has the power to provide an exclusive remedy to a seaman employed on a privately owned vessel operated for the United States. *Annestron Manufacturing Co. v. Davis*, 57 S.Ct. 816 (1937); *Crowell v. Benson*, 52 S.Ct. 285 (1932).

The Fifth Circuit has rejected Congress' authority and has erred in judicially amending the Suits in Admiralty Act. *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438, 454 (5th Cir. 1977). In considering the Suits in Admiralty Act, if there are two possible interpretations, it is the duty of the courts to adopt the one that will lend meaning to the "operating for" language of the statute and not to destroy it. A federal court lacks the power to take corrective actions to remedy a harsh result reached by the application of a federal statute. *Central Table Manufacturing Co. v. United States*, 94 S.Ct. 2516, 2525 (1974); *United States v. Second National Bank of North Miami*, 502 F.2d 535, 539-40 (5th Cir. 1974). Here, the Fifth Circuit's function was not to legislate but to interpret and apply the law as plainly written and intended by the legislative branch. *Matson Navigation Co. v. United*

States, 52 S.Ct. 162 (1932); *United States v. Thirty-Seven Photographs*, 91 S.Ct. 1400, 1404 (1971); *National Broiler Marketing Association v. United States*, 98 S.Ct. 2122, 2130 (1978); *United States v. M/V Big Sam*, 693 F.2d 451, 455 (5th Cir. 1982); *Maryland v. United States*, 85 S.Ct. 1293, 1301 (1965); *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 94 S.Ct. 690, 693 (1974); *Franklin v. First Money, Inc.*, 427 F.Supp. 66, 71 (E.D.La. 1976), *aff'd.* 599 F.2d 615 (5th Cir. 1979); *Allen v. David*, 334 F.2d 592, 601 (5th Cir. 1964); *Ricker v. United States*, 396 F.2d 454 (Ct.Cl. 1968); *Northwest Power Products, Inc., v. Omark Industries Inc.*, 576 F.2d 83, 90 (5th Cir. 1978).

A. CGL, A NAVY VESSEL AGENT, IS IMMUNE FROM SUABILITY UNDER SUITS IN ADMIRALTY ACT 1950 AMENDMENT

The 1950 Amendment to the Suits in Admiralty Act affirmed that only the United States is ultimately responsible for the acts of its maritime agents. This Amendment was in response to prior Supreme Court decisions which had suggested possible confusion as to whether a party plaintiff was permitted to sue the private owner who operated a vessel for the United States or had the right to sue the United States within the statutory two-year limitation. *See, Brady v. Roosevelt Steamship Co.*, 63 S.Ct. 425 (1943); *Hust v. Moore-McCormack*, 66 S.Ct 1218 (1946); *Caldarola v. Eckert*, 67 S.Ct. 1569 (1947); *Cosmopolitan Shipping Co. v. McAllister*, 69 S.Ct. 1317 (1949); *Lustgarten v. U. S. Shipping Board Emergency Fleet Corp.*, 50 S.Ct. 118 (1930).

The legislative history made it clear that the United States assumed liability for both the actions or failures to act of its maritime agents, thus lending purpose to the term "operated by or for" distinction:

> "The Committee believes that litigants should not be made the victims of the legal confusion regarding the proper remedy in such cases, and are not responsible for the conditions brought about by the lack of clarity in the opinions of the Supreme Court. Legislative relief is requisite not only to save to litigants possessing meritorious claims their right to a day in court, but also to settle the question of remedy in future cases."

1950 U.S. Code, Cong. Serv., at pg. 4209.

The Court below ignored the distinctive terms "operating by" and "operating for" of the Suits in Admiralty Act. As such, a vessel carrying munition and cargo exclusively for the Department of the Navy under a time charter may be seized. The panel failed to, or would not, reconcile §741, 742 and 745 of the SAA. *See, Williams v. Central Gulf Lines,* 874 F.2d at 1062.

This Court has previously held that §741 *must* be read *in pari materia* in order to support a consistent scheme of legislation. *Blamberg Brothers v. United States,* 43 S.Ct. 179 (1923); *Eastern Transp. Co. v. United States,* 47 S.Ct. 289 (1927).

Therefore, this Court is requested to answer the ultimate question: Does Congress legislatively require that the United States be responsible for the actions of its maritime agents when a vessel is time chartered by the United States?

The statutory answer is "yes." A simple reconciliation of the "operating by" and "operating for" language of the Suits in Admiralty Act can be made when 46 U.S.C. §741, 742 and 745 are read *in pari materia*:

"In cases where a privately owned vessel is

> operated for the United States, a proceeding in admiralty can be maintained for such vessels against the United States by reason of the same subject matter against the agent or employee of the United States whose actions or omissions gave rise to the claim."

The 1950 Amendments to the Suits in Admiralty Act reiterated Congress's intent that the United States be ultimately responsible for the acts of its "maritime agents," such as CGL. In *Smith v. United States*, the Court held:

> "The intent of the 1950 Amendment to the Suits in Admiralty Act, promulgating the proviso excluding the agent from suability, was not to keep alive the liability of a private person, firm or cooperation having charge of a government ship. It was just to the contrary. It was the adoption by Congress of the exclusivity principle enunciated in *Cosmopolitan Shipping Co. v. McAllister, supra*, 337 U.S. 783, 69 S.Ct. 1317. Another purpose was to designate unequivocably the one to whom a claim for loss caused by the government ship should be directed. . ."

346 F.2d at 453.

The lower court's opinion contains a serious error of statutory interpretation that in effect edits out the term "operated for" found in 46 U.S.C. §741.

B. ANY CLAIM BY THE LEGITEMATE HEIRS OF WILLIAMS, A SEAMAN, WHO CONTRACTED AIDS AND DIED WHILE BEING TREATED AT U.S. MILITARY HOSPITAL IS EXCLUSIVELY AGAINST THE U.S. AND NOT AGAINST CGL THE OPERATOR OF A NAVY CHARTERED VESSEL .

The United States has waived its sovereign immunity to permit the assertion of a claim arising from a vessel time chartered to the United States. In *Calmar Steamship Corp., supra*, Calmar Corporation had entered into a time charter with the United States to carry military supplies to the Philippines. Suit was filed against the United States to recover charter hire and for loss of the vessel. This Court held that a time-chartered vessel is employed as a "*merchant vessel*" and "*operated for*" the United States so that suit is cognizable under the Suits in Admiralty Act. *See also, Matson Navigation Co. v. United States, supra; Burkholder v. United States*, 60 F.Supp. 700 (E.D.Pa. 1945); *Epstein v. United States*, 86 F.Supp. 740 (S.D.N.Y. 1949); *Gulf Oil Corporation v. United States*, 121 F.Supp. 937 (S.D.N.Y. 1954); *Stubblefield v. Vickers Towing Company*, 674 F.Supp. 566 (N.D.Miss. 1987); *Dibiase v. United States*, 711 F.Supp. 648 (D.Me. 1989).

The Fifth Circuit in *Trautman v. Buck Steber, supra*, also held that a time-chartered vessel operated for the United States fell within the jurisdiction provided by §741.

> "It would seem to the Court that an extensive operation or direction of the vessel by government personnel would be required to make the vessel operated "by the United States" in something closer to a *time charter* where the government directs the vessel's overall function, even though the owner may control the operation of the vessel's personnel and equipment, rather than a single purpose contract entered into with

> an independent contractor, would be required to make the vessel "operated for the United States."

693 F.2d at 444.

Once the "jurisdictional hook" was established, the *Trautman* Court had to decide whether Buck Steber was a "maritime agent" of the United States *or* whether an independent admiralty claim would libel the United States but for its sovereign immunity in order to impose application of the Suits in Admiralty Act:

> "Whether Steber was an *agent* of the United States *and/or* whether the United States was in sufficient operation or control of Steber's activities in order to cause the United States to be liable under the Jones Act, 46 U.S.C. §688 for the negligence of Steber which caused or contributed to appellant's injuries."

693 F.2d at 445.

The primary inquiry was not whether an independent admiralty claim against the United States could be found, but whether an agency relationship existed.

The Suits in Admiralty Act merely substitutes a remedy against the United States for a claim against the private operator. *See, Bradey v. United States,* 151 F.2d 742 (2nd Cir. 1945), *cert. denied,* 66 S.Ct. 484 (1946). The Act authorizes suit against the United States and provides an exclusive remedy under the following three situations: (1) where an injury is caused by a vessel *owned by* the United States; (2) where an injury is caused by a vessel *operated by* the United States; (3) in cases where an injury is caused by a vessel *operated for* the United States. The

language of the statute is disjunctive and, therefore, the fulfillment of any one of the aforementioned conditions will satisfy the requirements of the Act.

The Fifth Circuit majority in *Williams* erred in assuming that under *Trautman, supra,* the Suits in Admiralty Act could not provide a cause of action against the United States. It required that an independent admiralty claim be shown to exist against the United States. However, 46 U.S.C. §742 plainly states that "where if such vessels were privately owned or operated. . ., a proceeding in admiralty *could* be maintained. . .against the United States." Section 742 does not state "if" a proceeding in admiralty could be maintained, an action against the United States could be brought. There is no statutory requirement that an independent claim against the U.S. be cognizable. Correctly or incorrectly, Congress has the power to provide an exclusive remedy against the United States in this case. *Annestron, supra; Crowell, supra.*

C. CGL WAS A MARITIME AGENT OF THE UNITED STATES WHICH HAD SUFFICIENT CONTROL OVER OPERATIONS TO MANDATE APPLICATION OF SUITS IN ADMIRALTY ACT

Since CGL was unquestionably the operating agent of the United States within the meaning of 46 U.S.C. §742, the question of whether Williams has a claim that can be asserted independently against the U. S. is irrelevant. Even so, a time charterer *can assume* liability for the negligence of a crew or the unseaworthiness of a vessel. *P&E Boat Rentals v. Ennia General Ins. Co.,* 872 F.2d 642 (5th Cir. 1989). Congress has statutorily assumed liability for private vessels being operated for it under the Suits in

Admiralty Act.

A reading of the Charter Party at issue and the undisputed material facts show that CGL was the maritime agent of the United States, triggering the exclusivity provisions of 46 U.S.C. §745. *Smith v. United States, supra; Petition of United States,* 367 F.2d 505 (3rd Cir. 1966); *Watts v. Pinckney,* 752 F.2d 406 (9th Cir. 1985).

The operational control exhibited by the United States with respect to manning, ports of call, written sailing instructions, and cargo to be carried on the S.S. BAY is unquestioned. The United States retained the "ultimate control" over each voyage and CGL was charged with implementing the orders given, just as a soldier implements the orders of his commanders. Since CGL operated the S.S. BAY for the United States as directed, it became the agent of the United States.

The terms "agent" and "employee" of the United States are construed very broadly by the courts. This is consistent with the purpose and intent of Congress in drafting and amending the Suits in Admiralty Act, which provided for a seaman's remedy arising out of employment aboard a vessel being operated for the United States as being exclusively and solely against the United States under the Suits in Admiralty Act. *See, Smith v. United States, supra; Santos v. RCA Service Co.,* 603 F.Supp. 943 (E.D.La. 1985); *Cruz v. Marine Transport Lines, Inc.,* 634 F.Supp. 107 (D.N.J. 1986) *aff'd.,* 806 F.2d 252 (3rd Cir. 1986); *Petition of United States, supra; Doyle v. Bethlehem Steel Corp., supra; Shields v. United States,* 662 F.Supp. 187 (M.D.Fla. 1987).

The control necessary to invoke the exclusivity provisions of the Suits in Admiralty Act is not detailed super-

vision of the minutia of the vessel's operations, but "rather a shifting of financial risk by assigning the ability to exclusively control when the vessel will sail and what cargo she will carry and where the vessel will sail." *See, Stubblefield, supra; N. S. Byonnes & Son Dampskibsrederi Aktieselskab v. United States,* 298 F. 123 (S.D.N.Y. 1923).

CGL was that type of agent for the United States. The United States was in sufficient operational control of the S.S. BAY's activities so that the United States alone would be libel for the claims asserted for the treatment and death of an AIDS diagnosed seaman's death.

D. THE TERM PUBLIC VESSELS UNDER THE PUBLIC VESSELS ACT INCLUDES PRIVATELY OWNED VESSELS OPERATED EXCLUSIVELY FOR THE NAVY

If this Court recognizes that plaintiff's exclusive remedy is against the United States under the Suits in Admiralty Act, this Court need not consider the applicability of the Public Vessels Act, 46 U.S.C. §781, *et seq.* Although this Court has previously distinguished between a merchant vessel and a commercial vessel, the term "public vessel" is not statutorily defined.

Recently, the Navy has embarked on a plan which includes the hiring of privately owned vessels and the term "public vessel" has been broadly construed. Given today's economic realities and the use by MSC of privately owned vessels to carry munitions and military supplies, the term "public vessels" must include within its definition privately owned vessels that are exclusively performing military functions under the ultimate control of the Department of the Navy. *Santos v. RCA Service Co., supra; Bradey v. United States, supra; George W. Rogers Construction*

Corp. v. United States, 118 F.Supp. 927 (S.D.N.Y. 1954); *Roeper v. United States*, 85 F.Supp. 864 (E.D.N.Y. 1949); *River & Offshore Services Co. v. United States*, 651 F.Supp. 276 (E.D.La. 1987); *Marine Coatings of Alabama, Inc. v. United States*, 674 F.Supp. 819 (S.D.Ala. 1987).

If the S.S. BAY did not function as a merchant vessel operated for the United States under the provisions of the Suits in Admiralty Act, its operation certainly classified it as a public vessel while under the sailing direction of MSC in carrying military cargo.

CONCLUSION

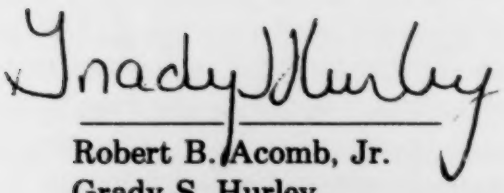
Ballard Williams died of AIDS while assigned to a vessel operated exclusively for the United States Department of the Navy. The United States has waived its sovereign immunity and a proceeding in admiralty can be maintained against the United States for the alleged acts or omissions of CGL, 46 U.S.C. §741, 742, 745. The primary purpose of the Suits in Admiralty Act is the waiving of governmental immunity for actions against vessels operated "by" or "for" the United States and to prohibit *in rem* seizure of such vessels. The Fifth Circuit's decision affects cases pending in Louisiana, Texas, California, Oregon, Pennsylvania, Virginia and New York and permits *in rem* seizure of vessels operated for the United States carrying military supplies.

The Fifth Circuit's interpretation of 46 U.S.C. §741 is contrary to the Congressional intent expressed in the committee reports on the 1950 Amendments. It is axiomatic that §741 and §742 must be interpreted *in pari materia*. Section 741 exempts certain vessels and cargo, including vessels operated "by or for" the United States, from seizure by judicial process. Section 742 waives

sovereign immunity with respect to "such vessels." Vessels time chartered to the United States must logically come within the ambit of *both* §741 and §742.

The term "public vessel" is not statutorily defined in the Public Vessels Act. Considering the present use and dependence of the United States Navy on chartering private vessels and dictating their cargo, ports and routes, it is certain that such vessels if not "operated for" the United States are "public vessels." While not a bareboat charterer, the United States Military controlled the operation of the S/S BAY within the meaning and intent of 46 U.S.C. §781, *et seq.*

Respectfully submitted,



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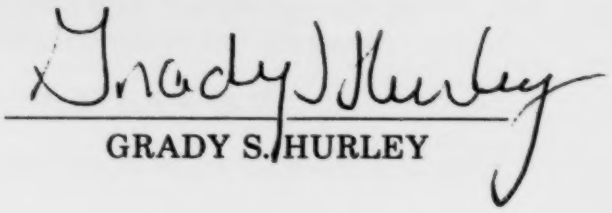
Telephone: (504) 581-8000

Counsel for Petitioner

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been mailed by U. S. Mail to all counsel of record, and to the United States Attorney's office, this 17th day of November, 1989, New Orleans, Louisiana.



GRADY S. HURLEY

APPENDIX A

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersiged authority, a Notary Public duly commissioned and qualified in the parish and state aforesaid, personnally came and appeared

DENNIS HANNAN

who, of his own personal knowledge, deposed and said:

1. That he is employed by Central Gulf Lines, Inc. as Vice-President of Operations;

2. That on or about June 4, 1984, the S/S BAY was owned by Central Gulf and operated pursuant to a Time Charter with the United States Government;

3. That pursuant to the terms of the Charter Agreement, Central Gulf supplied the master, officers, and crew for the S/S BAY, whereas the United States designed the ports of call and cargo carried;

4. That pursuant to the terms of the Charter Agreement, the United States Government directed all movements of the S/S BAY during the duration of the charter and the S/S BAY worked solely for the Government during the effective period of the Charter.

/s/ Dennis Hannan
DENNIS HANNAN

SWORN TO AND SUBSCRIBED
BEFORE ME, THIS 30
DAY OF MARCH, 1988.

/s/ illegible

APPENDIX B

District	Off.	Docket No. Yr.	Number	OR	Filing Date Mo.	Day	Yr.	J	Nature Suit
053L	2	87	02585	1	06	02	87	3	340

R 23	Judge	Mag.	Dem	ARB	MDL Docket	Docket Yr.	Number
	3L22	3LBG				87	02585

CASE: TITLE 46 SEC. 0688 - MARINE PERSONAL INJURY

87-2585

PLAINTIFFS	DEFENDANTS
WILBERT WILLIAMS, Personal Representative Of the Estate of BALLARD WILLIAMS, Deceased	CENTRAL GULF LINES **AMENDED COMPLT-9/29/87 NO NEW PTYS**

ATTORNEYS

TILLERY & TILLERY
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Daniel Rayburn, Jr.
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582-8000
For: *Central Gulf Lines*

WEDNESDAY, April 13, 1988

9:30 A.M.

MOTION OF CENTRAL GULF LINES FOR SUMMARY JUDGMENT.

MOTION ORDERED GRANTED.

DATE OF ENTRY APR 18 1988

APPENDIX C

Wilbert WILLIAMS, Personal Representative of the Estate of Ballard Williams, Deceased,
Plaintiff-Appellant.

v.

CENTRAL GULF LINES,
Defendant-Appellee.

No. 88-3274.

United States Court of Appeals,
Fifth Circuit.
June 12, 1989.

Action was brought against seaman's private maritime employer for various acts of negligence related to illness and death of seaman. The United States District Court for the Eastern District of Louisiana, Veronica D. Wicker, J., dismissed, and appeal was taken. The Court of Appeals, Thornberry, Circuit Judge, held that exclusivity provision of Suits in Admiralty Act did not bar action against private maritime employer, through vessel was under time charter to the United States at time of seaman's death.

Vacated and remanded.

Gee, Circuit Judge, filed concurring and dissenting opinion.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, GEE and POLITZ, Circuit Judges.

THORNBERRY, Circuit Judge:

The issue in this case is whether the exclusivity provision contained in the Suits in Admiralty Act, 46 U.S.C.App. §§ 741-745, operates under the present circumstances to bar the plaintiff-appellant's suit against a private maritime employer. The district court held that the plaintiff's sole remedy was against the United States and dismissed the present suit because the only named defendant was a private maritime employer. Because we find that a cause of action could not have been stated against the United States within the meaning of the Suits in Admiralty Act, we now vacate the judgment and remand for further proceedings.

I. BACKGROUND

In March 1984, Ballard Williams ("Ballard"), a seaman employed by appellee Central Gulf Lines ("Central Gulf") aboard its vessel, the S/S Bay, became ill with flu-like symptoms. Central Gulf placed him ashore at the Subic Bay Naval Hospital and later transferred him to the Clark Air Force Basse Hospital where, on June 4, 1984, Ballard died. The initial autopsy report listed multiple glioblastomatic brain tumors as the cause of death. Subsequent amendments to the autopsy report suggest that the brain leisions may have resulted from Acquired Immune Deficiency Syndrome.

Individually and as representative of Ballard's estate, Wilbert Williams ("appellant") brought suit under general maritime law and the Jones Act, 46 U.S.C.App. § 688, against Central Gulf alleging its negligence in (1) failing to provide adequate medical service and treatment, and (3) failing to notify Ballard's family of his illness in a timely manner so as to provide them with an opportunity to seek alternative medical services.

During discovery it was revealed that, at the time of Ballard's death, the S/S Bay was under a time charter to the United States for use by the Military Sealift Command, an agency of the Department of the Navy. Central Gulf moved for summary judgment or, alternatively, to dismiss on the grounds that, pursuant to the Suits in Admiralty Act's exclusivity provision, the plaintiff's sole remedy was a claim against the United States. The district court agreed with Central Gulf's interpretation of the Suits in Admiralty Act and, because the United States had not been named as a party-defendant, dismissed the suit. The appellant since filed a timely notice of appeal.

II.

To support its position that Ballard's only claim relating to the alleged negligence lies against the United States, Central Gulf relies on the Suit in Admiralty Act's exclusivity provision which provides in part:

> Suits [against the United States] as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States....

46 U.S.C.App. § 745. We find the statutory language providing that the exclusivity provision will only be triggered "where a remedy is *provided by* this chapter"[1] central to resolving the present dispute. The language is potentially misleading in two respects. First, as we have noted before, the Suits in Admiralty Act "does not itself *privide* a cause

---

[1] "This chapter" as used in section 745 refers to chapter 20 of Title 46, the Suits in Admiralty Act.

of action against the United States. Instead, it only acts as a waiver of the sovereign immunity of the United States in admiralty cases. Thus, the act merely provides a jurisdictional hook upon which to hang a traditional admiralty claim." *Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 444 (5th Cir.1982) (citation omitted) (emphasis added). Second, Chapter 22 of Title 46, the Public Vesels Act, although not a part of "this chapter" as that term is used in section 745, specifically incorporates the provisions of Chapter 20, including the exclusivity provision, to the extent not inconsistent with its own provisions. *See* 46 U.S.C.App. § 782. Like the Suits in Admiralty Act, the Public Vessels Act is a jurisdictional statute waiving the United States' immunity to suit under specified conditions. *Trautman*, 693 F.2d at 444 n. 2.

Central Gulf argues on appeal that, because the Public Vessels Act or alternatively the Suits in Admiralty Act provides a remedy against the United States, section 745 operates to bar the appellant's claim. After a careful examination of statutory language, case law, legislative history, and the historical milieu surrounding the enactment of the Suits in Admiralty Act and Public Vessels Act, we find that neither Act provides a remedy under the specific facts of this case and that the exclusivity provision, therefore, does not bar suit against Central Gulf.

III. THE PUBLIC VESSELS ACT

[1] We may easily dispose of Central Gulf's contention that the Public Vessels Act, 46 U.S.C.App. 781 *et seq.*, provides Ballard with a remedy against the United States. The Act waives the United States' immunity in suits "for damages caused by a public vessel of the United States." *Id.* While "public vessel" is not defined in the Act, existing case law and the charter agreement satisfy us that the S/S Bay is not a public vessel.

The S/S Bay is privately owned by Central Gulf and, at the time of Ballard's death, was time chartered to the United States. Pursuant to the agreement between the United States and Central Gulf, Central Gulf agreed to transport "any lawful cargo" at times and to ports of departure and call as designated by the United States. The charter expressly provides:

> ARTICLE 22. THE MASTER, OFFICERS AND CREW
>
> (a) The Master, Officers and crew of this Vessel shall be appointed or hired by the Owner and shall be deemed to be the servants and agents of the Owner. . . . The Master of vessel, shall be under the direction of the Charterer as regards the employment of the Vessel, *but shall not be under Charterer's orders as regards navigation, care and custody of the Vessel and care of cargo.*
>
> ARTICLE 31. CHARTER NOT A DEMISE
>
> Nothing herein contained shall be construed as creating a demise of the Vessel to the Charterer, the Owner [Central Gulf] under this Charter retaining complete and exclusive possession and control of the vessel and its navigation.

(emphasis added.)

In *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 96 S.Ct. 1319, 47 L.Ed.2d 653 (1976), while reflecting on the seminal case *Calmar S.S. Corp. v. United States*, 345 U.S. 446, 73 S.Ct. 733, 97 L.Ed. 1140 (1953), the Supreme Court touched on the question of whether a privately owned vessel whose destinations and cargoes were controlled by the United States as charterer but whose possession and operation remained with the private

owner/operator constituted a "public vessel." Referring to the vessel in *Calmar,* the Supreme Court remarked.

> In that case [Calmar] the private owner of a steamship under charter to the United States brought suit for additional charter hire for the loss of its vessel, which was bombed by enemy airplanes while carrying military supplies and equipment. *The vessel was clearly not a 'public vessel' under the Public Vessels Act, because it was privately owned and operated.*

United Continental, 96 S.Ct. at 1325 (emphasis added). In view of Articles 22(a) and 31, *supra,* of the charter agreement between Central Gulf and the United States pursuant to which the United States hired a privately owned vessel but did not engage in its operations, we consider *United Continental* compelling authority for holding that the S/S Bay was not a public vessel within the meaning of the Public Vessels Act. *Cf. Blanco v. United States,* 775 F.2d 53, 59 (2d Cir.1985) (holding privately owned vessel under bareboat or demise charter to the United States and used solely in public service to be a "public vessel" under the Act); *Marine Coatings of Alabama, Inc. v. United States,* 674 F.Supp. 819, 822 (S.D.Ala. 1987) (naval support vessels, owned by the United States, are public vessels); *Santos v. RCA Service Co.,* 603 F.Supp. 943, 946 (E.D.La. 1985) (vessel owned by the United States, operated by private contractor, and engaging in military functions is a public vessel); *Bradey v. United States,* 151 F.2d 742, 743 (2d Cir.) *cert. denied,* 326 U.S. 795, 66 S.Ct. 484, 90 L.Ed. 483 (1946) (vessel owned by the United States carrying coal owned by the Army is a public vessel).

Since, under the Public Vessels Act, a prerequisite to the government's waiver of immunity is the involvement of

a public vessel, Central Gulf's attempt to invoke section 745's exclusivity provision through the Public Vessels Act must fail.

IV. THE SUITS IN ADMIRALTY ACT

[2,3] The exclusivity provision may bar the appellant's suit against Central Gulf "where a remedy [against the United States] is provided by [the Suits in Admiralty Act]." 46 U.S.C.App. § 745. As mentioned above, this court recognized that the provisions of the Suits in Admiralty Act do not themselves *provide* a remedy. Rather, the Act merely acts to waive the United States's immunity so as to furnish a "jurisdictional hook on which to hang a traditional admiralty claim." *Trautman*, 693 F.2d at 444. In light of *Trautman*, we view the issue of whether a remedy against the United States is *provided* by the Suits in Admiralty Act as entailing a two part inquiry. First, we must ask whether the United States has consented to suit given the facts at hand. This is the "jurisdictional hook" inquiry and involves applying the Act's statutory language to the present circumstances. If a jurisdictional hook is found to exist, we must then ask whether the party attempting to invoke the exclusivity provision as a defense to suit his shown that "a traditional admiralty claim" could have been stated against the United States. Only by satisfying this two part test can it be concluded that "a remedy is provided by [the Suits in Admiralty Act]" so as to justify barring plaintiffs from bringing suit against private entities such as Central Gulf.

A. The "Jurisdictional Hook" Inquiry

As discussed, Central Gulf owned the S/S BAY, the vessel on which Ballard became ill. Pursuant to a written agreement, Central Gulf time chartered the vessel to the

United States but retained possession and control of the vessel's day-to-day operations. *See supra* Articles 31 and 22(a) of the charter agreement. The United States controlled the cargoes carried and ports of call and destination to which the vessel sailed.

Based on these relationships, Central Gulf argues that the Suits in Admiralty Act functions to waive the United States sovereign immunity thus establishing a jurisdictional hook. We agree. The relevant sections of the Suits in Admiralty Act provide:

> **§ 741 Exemption of United States vessels and cargoes from arrest and seizure**
>
> No vessel owned by the United States . . ., or in the possession of the United States . . . or *operated by or for* the United States . . ., and no cargo owned or possessed by the United States . . . shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process . . . .

(Emphasis added). The libel in personam provision mentioned in section 741 states:

> **§ 742 Libel in personam**
>
> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . .

Central Gulf argues that by reason of the time

charter arrangement the S/S BAY was *operated for* the United States within the meaning of section 741 and that the United States is subject to admiralty proceedings under section 742 as if "such vessel," i.e. one operated for the United States, were privately owned or operated. This argument highlights what we consider a difficult, if not impossible, task of reconciling the applicability of section 742 to privately owned vessels with the "operated for" language which, in order to give the phrase meaning distinct from the "owned by" category, we infer includes the involvement of privately owned vessels. *See also Trautman* at 444 (likening the phrase "operated by" United States to a demise or bareboat charter and "operated for" the United States to a time charter arrangement). However, because we are able to dispose of the current dispute without relying on the "operated for" language or § 741, we need not presently solve the conumdrum counsel present.

In 1960 Congress amended section 742 by adding the clause "if a private person or property were involved" to the first sentence of the section. Act of Sept. 13, 1960, Pub.L. No. 86-770, § 3.74 Stat. 912 (1960). *See De Bardelebren Marine Corp v. United States,* 451 F.2d 140 (5th Cir. 1971) (discussing the legislative history of section 742 including the 1960 amendment). The first sentence of section 742 now states in relevant part:

> In cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . .

We have concluded that this amendment was "'intended to bring all admiralty claims against the United States within the ambit of the [Suits in Admiralty Act], whether or not

involving government cargoes or vessel(s).'" *Trautman*, 693 F.2d at 445 (quoting *Kelly v. United States*, 531 F.2d 1144, 1149 (2d Cir.1976)); *See also id.* at 444 (1960 amendment did much to undercut the significance of determining whether a vessel is owned, in the possession of, operated by, or operated for the United States). *But see, United Continental*, 96 S.Ct. at 1329 (holding that "claims within the scope of the Public Vessels Act remain subject to its terms after the 1960 amendment to the Suits in Admiralty Act.").

In view of the 1960 amendment, if a proceeding in admiralty could be asserted against a private person in the Government's position, then the Suits in Admiralty Act will provide a jurisdictional hook on which to hang a claim against the Government. Had a private party time chartered the S/S BAY, we are persuaded that, based on notions of operational control, such person could be subject to suit for the negligence alleged herein. Thus, by operation of the 1960 amendment to the Suits in Admiralty Act, the Government, under the present circumstances, has consented to suit as if a private person were involved.

B. The "Traditional Admiralty Claim" Inquiry

The Suits in Admiralty Act will not "provide a remedy" as envisioned by section 745's exclusivity provision unless, when the action arose, principles of maritime law would have allowed the appellant to state a claim against a private person in the same position as the Government, i.e. against a private time Charterer. This Circuit's general rule is that a time charterer "'who has no control over the vessel, assumes no liability for negligence of the crew or unsea-worthiness of the vessel absent a showing that the parties to the charter intended otherwise.'" *P & E Boat Rentals, Inc. v. Ennia General Insurance Co., Inc.*, 872 F.2d 642, 647 (5th Cir.1989) (quoting *Mallard v.*

Aluminum Co. of Canada, Inc., 634 F.2d 236, 242 n. 5 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.E.2d 85 (1981)). *See also* M.J. Norris, *The Law of Maritime Personal Injuries 3d.* § 130 (1987). The term "control" as used by this court in formulating this general rule refers to operational control of the vessel, not ultimate control of its destination or cargoes.

Article 22(a) of the present charter agreement patently states that "[t]he Master of the Vessel . . . shall not be under the direction of the Charterer as regards navigation, care and custody of the Vessel and care of the cargo." We find that, by operation of this provision, the United States acquired no operational control over the vessel. Although the charter provides that the United States shall bear certain costs, responsibility for costs "in and of itself does not transfer operational responsibility from the owner." *Mallard*, 634 F.2d at 242 n. 5. Indeed, "this circuit seems reluctant to find any shift of operational responsibility for personal injuries to the time charterer absent clear language to that effect." *Id.* The charter contains no clear language whereby the United States assumes responsibility for the vessel's operations or for personal injuries caused by negligence of the crew. We therefore hold that operational control did not shift from Central Gulf to the United States and that, given the specific facts at hand, the appellant would have been unable to state a claim against the United States as time charterer.

V. CONCLUSION

Application of our two part inquiry indicates that the second prong, i.e. the existence of a traditional admiralty claim prong, has not been met. Because a jurisdictional hook alone does not suffice to "provide a remedy" under the Suits in Admiralty Act. section 745's exclusivity provi-

sion does not operate to bar suit against Central Gulf. We therefore VACATE the dismissal of the appellant's claims and REMAND for proceedings not inconsistent with this opinion.

GEE, Circuit Judge, concurring in part and, in part, dissenting:

I concur in parts I-IV(A) of the majority opinion. Under the facts of this case and established principles of maritime law, however, it seems to me patent that Ballard satisfied both the "jurisdictional hook" and traditional admiralty claim tests required for suit under the Suits in Admiralty Act. I therefore dissent from the Judgment of the Court.

The Suits in Admiralty Act, 46 U.S.C. App. § 741 et seq., was amended in 1950 to eliminate uncertainty as to who was ultimately responsible for wrongful acts of maritime agents of the United States. The relevant portions of the act provide:

> **Section 741**
>
> **Exemption of United States Vessels and Cargoes from arrest or seizure.**
>
> No vessel owned by the United States . . . or in the possession of the United States . . . *or operated by or for the United States* . . .shall . . . be subject to arrest or seizure by judicial process . . . (emphasis added).
>
> **Section 742:**
>
> **Libel in personam.**

> In cases where if such vessel were privately owned or operated . . . or if a private person or porperty were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam may be brought against the United States . . .
>
> **Section 745:**
>
> **Causes of action for which suit may be brought . . .**
>
> Suit as authorized by this chapter may be brought only within two years after the cause of action arises . . . where a remedy is provided by this chapter it shall hereafter be exclusive of any action by reason of the same subject matter against the agent or employee of the United States . . . whose acts or Omissions gave rise to the claim . . .

The majority notes that this Act applies to vessels "opeated for" the United States as well as those "owned by" or "operated by" the United States. The majority also refers to our opinion in *Trautman v. Buck Steber, Inc.*, 693 F.2d 440 (5th Cir.1982) in which we held that:

> . . . *something closer to a time charter when the Government directs the vessel's overall functions even though the owner may control the operation of the vessel's personnel and equipment rather than a single purpose contract entered into with an independent contractor would be required to make the vessel "operated for the United States."* *Id.* at 444, citing *J.W. Petersen Coal and Oil Co. v. United States*, 323 F.Supp. 1198, 1205-06 (N.D.Ill.1970) (emphasis added).

Nonetheless, the majority goes on to conclude that the Suits in Admiralty Act does not apply to time-charters in which the government directs the employment of the vessel but the owner retains operational control over it.

In reaching this conclusion the majority observes that it is "able to dispose of the current dispute without relying on the "operated for language of § 741." The majority concedes that the first clause of § 742, i.e., "if *such* vessel were privately owned or operated", can only be understood by reference to § 741. The majority concludes, however, that the "jurisdictional hook" inquiry is satisfied under the third phrase in § 742, eliminating the need to address that inquiry under the first phrase as defined by § 741. To the extent that § 742 and § 741 are consulted solely to determine whether the jurisdictional hook inquiry is satisfied, this analysis is sound. I believe, however, that we must also address §§ 742 and 741 to determine whether the second prong of the majority's test, the traditional admiralty claim inquiry, has been satisfied.

In concluding that the second prong of the test has not been met the majority notes that under traditional maritime principles a time-charter "who has no control overt the vessel assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise." *P & E Boat Rental* at 647. The majority apparently believes that it is impossible to reconcile this principle with the "operated for" language of § 742. I have no such difficulty.

For good or ill, the Congress can do as it likes with traditional maritime principles in such matters as this, and there is nothing doubtful about the phrase "operated for." Nor have we held that a time charterer who has no control over a vessel is never liable for a crews' negligence. Rather,

we have held that this rule applies absent a "showing that the parties to the charter intended otherwise." *Id.* In a case where the time charterer is the government, that showing is clearly evidenced by the "such vessels" language of § 742. The vessels referred to in this section include all vessels mentioned in § 741, including vessels "operated for" the United States, i.e., vessels over which the government exercises no operational control. Because it seems clear to me that Gulf Central satisfied both the "jurisdictional hook" and "traditional admiralty claim" inquires. I would hold the exclusivity provision of § 745 applicable to this case. As the majority does not.

I respectfully DISSENT.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3274

FILED
AUG 22 1989

WILBERT WILLIAMS, Personal Representative
of the Estate of BALLARD WILLIAMS, Deceased
Plaintiff-Appellant,

versus

CENTRAL GULF LINES,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 06/12/89, 5 Cir., 198__, ____F.2d____)

( )

Before THORNBERRY, GEE and POLITZ, Circuit Judges

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor

Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

Supreme Court, U.S.
FILED
DEC 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-814

In the Supreme Court of the United States

OCTOBER TERM, 1989

CENTRAL GULF LINES, INC.
Petitioner,

VERSUS

WILBERT WILLIAMS, Personal Representative of the Estate of BALLARD WILLIAMS, Deceased
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Certain portions of appellant's recital of the facts are contested by respondent:

I. Central Gulf controlled the S/S BAY

The Fifth Circuit correctly found and the fact is that under the charter agreement Central Gulf Lines retained "complete and exclusive possession and control of the vessel and its navigation" (Charter Article 31, Lodgings, Exhibit 2). The Charter also says that the Master of the S/S BAY "shall not be under the Charterer's orders as regards navigation, care and custody of the Vessel and care of the cargo", and that Central Gulf retained complete control over the "masters, officers and crew" of the vessel (Charter Article 22 (a), Lodgings, Exhibit 2). The charter expressly provides that it is not a demise charter (Charter Article 31, Lodgings Exhibit 2).

Central Gulf also maintained financial responsibility for the voyage, since under the charter it was responsible for hiring and paying the "master, officers and crew," (Charter Article 22 (a), Article 10, Lodgings Exhibit 2) and had responsibility to maintain the vessel "in a thoroughly efficient state in hull, machinery, equipment, personnel and other particulars relative to seaworthiness of the vessel." Central Gulf, the charter says, "shall pay for all expenses incurred in the navigation and management of the vessel" (Article 21 (a), Lodgings, Exhibit 2).

Despite clear language to the contrary in the Charter Party itself, Central Gulf inexplicably continues to argue that it did not maintain control over the vessel, its crew and navigation.

II. Neither AIDS nor war is at issue in this application

Though the cause of Williams' death and the type of cargo carried by the S/S BAY are not germane to the issue before the Court, respondent points out:

Evidence that Ballard Williams was infected with the AIDS virus is contested. The only evidence of such is the conclusion of a physician made January 16, 1987, almost three years after Williams' death, based on a test allegedly performed then on Williams' blood. Neither chain of custody of Williams' blood sample nor adequacy of preservation or testing method has been established. The United States Air Force physician's conclusion was that results are "consistent with" diagnosis of AIDS (Lodgings, Exhibit 1). Applicant's conclusion that "his cause of death probably was AIDS" is highly suspect for a number of reasons, including the fact that people do not "die of" AIDS at all. It is commonly known that the AIDS virus destroys the human immune system eventually permitting various infections to invade the body, some of which can be fatal. There is no evidence whatsoever that Williams contracted AIDS "while aboard" the vessel, as applicant claims.

Applicant for the first time in this litigation seeks to characterize the S/S BAY as a Navy "munitions" ship, when in fact the record is short on evidence to support that characterization. Central Gulf's original brief in the Fifth Circuit stated that the S/S BAY carried "dry cargo and supplies, including munitions." The affidavit of Mr. Hannan (Applicant's Appendix A) does not mention it.

SUMMARY OF ARGUMENT

The decision of the Fifth Circuit should not be reviewed because:

(1) The decision was one of first instance in the federal appellate courts, and is not in conflict with any federal appellate decision, statute, or state supreme court case.

(2) It merely fashioned a judicial test designed to solve a problem posed by the facts of the case at bar.

(3) It is a sound decision which provides a clear guide for future resolution of similar cases.

ARGUMENT

The issue in *Williams v. Central Gulf Lines*, 874 F. 2d 1058 (5th Cir. 1989) is whether the exclusivity provision of the Suits in Admiralty Act should apply to a privately owned vessel merely time-chartered to the United States, thus excluding tort claims against a private vessel owner and shifting responsibility for those claims to the United States.

The decision of the Fifth Circuit is one of first instance in the federal appellate courts on this issue. There are no conflicting federal appellate decisions, federal statutes or state supreme court decisions. The decision does resolve an apparent jurisprudential conflict in the Federal District Courts. See *Stubblefield v. Vickers Towing Company*, 674 F. Supp. 566 (N.D. Miss. 1987), which held that a privately owned vessel time-chartered to the United States was "operated for the United States" within the meaning of the Suits in Admiralty Act, and *Habrat v. United States*, 310 F. Supp. 618 (W.D. Pa. 1970), which reached the opposite conclusion. In *Williams* the Fifth Circuit fashioned a test which solves the problem of how to reconcile the language of the Suits in Admiralty Act ("SAA", 46 U.S.C. Section 741 et seq.,) and the inequity of

its strict application to the privately owned vessel merely time-chartered to the United States.

The *Williams* case posed this problem: how can the courts strictly apply the language of the SAA to hold that a privately owned vessel merely time-chartered to the United States is therefore a vessel "operated for" the United States within the meaning of the statute, when to do so would mean that (a) a private employer like Central Gulf would be exempt from claims for maritime injury to its own employees aboard its own vessel, (b) liability for such claims would be shifted to the United States, (c) a seaman who suffers injury in those circumstances would lose his claims unless filed within the two year statute of limitations for claims against the United States, and (d) mass confusion would ensue in all cases of injury aboard private vessels time-chartered to the United States, because the legal interpretation of each charter agreement would be necessary to determine whether the proper defendant is the private employer/vessel owner or the United States of America.

Central Gulf Lines provides detailed analysis of the language of the charter agreement and argues that it shows delegation of sufficient "control" of the vessel to the United States in order to shift legal responsibility for injury claims to the United States. But in seeking reversal of the Fifth Circuit decision, Central Gulf wants to place that burden of analysis on the injured seaman, who when injured while working for a private employer aboard its own vessel which is time-chartered to the United States at the time of his injury, must then sue the United States within two years of his injury (see 46 USC Section 745) and provoke a judicial analysis of the time charter agreement. If insufficient delegation of "control" is found, then the United States is dismissed and the seaman knows the private

maritime employer is the proper defendant.

This absurd and unfair situation has been resolved by the Fifth Circuit in *Williams* in a way which does justice to the intent and language of the SAA and allows considered application of legal principles to each fact situation presented. The Fifth Circuit has fashioned a two-pronged test for Courts to apply in resolving this somewhat thorny issue. The test is sound in principle, does justice in its application and fosters one of the primary purposes of the SAA as amended, to permit a seaman to ascertain with reasonable certainty the identity of the proper defendant for his claims. S. Rep. No. 1782, 81st Cong., 2d Sess. 1950, U.S. Code Cong. Serv. 4210.

A PRIVATE VESSEL IS NOT A PUBLIC VESSEL

Central Gulf argues that the S/S BAY was a "public vessel" within the meaning of the Public Vessels Act, 46 U.S.C. Section 781. There is no authority for the proposition that a privately owned vessel merely time-chartered to the United States is therefore a public vessel, and even the sole direct jurisprudential authority for Central Gulf's original motion, *Stubblefield v. Vickers Towing Company, supra*, acknowledged that such a vessel is not a public vessel. 674 F. Supp. at 568. See *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 96 S. Ct. 1319, 47 L. Ed. 2d 653 (1976).

For this reason, the issue is inappropriately raised herein.

CONCLUSION

The Fifth Circuit has performed an important judicial function by fashioning a clear and reasoned test to

be applied in order to determine the identity of the proper defendant in claims for injury to seaman aboard privately owned vessels which happen to be time-chartered to the United States at the time of the injury. To upset that decision would cast immediate uncertainty on the rights and obligations of seamen, private maritime employers and the United States.

For these reasons the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been mailed by United States Mail, postage prepaid and properly addressed, to all counsel of record and to the United States Attorney's Office, this 16th day of December, 1989.

CHALMETTE, LOUISIANA.

_____

A. SCOTT TILLERY